McCREARY COUNTY, KENTUCKY
v.
AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY et al.

545 U.S. --- (2005)

[Two counties posted large, readily visible copies of the Ten Commandments in their courthouses. The counties adopted nearly identical resolutions calling for a more extensive exhibit meant to show that the Commandments are Kentucky's "precedent legal code." The resolutions noted several grounds for taking that position, including the state legislature's acknowledgment of Christ as the "Prince of Ethics." The displays around the Commandments were modified to include eight smaller, historical documents containing religious references as their sole common element.

[Held: A determination of the Counties' purpose is a sound basis for ruling on the Establishment Clause complaints. When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.

[Held: No reasonable observer could accept the claim that the Counties had cast off its objective of promoting religion.

[The Court does not hold that a sacred text can never be integrated constitutionally into a governmental display on law or history.]

[The following excerpts from *McCreary County* and *Van Order* emphasize the justices' discussion of the original understandings of the First Amendment's Establishment Clause.]

The Opinion of the Court (Souter, J.)

[W]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides. . . . Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the "understanding, reached ... after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens ... ." Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting). By showing a purpose to favor religion, the government "sends the ... message to ... nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members... .' " Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 309—310 (2000) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

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The importance of neutrality as an interpretive guide is no less true now than it was when the Court broached the principle in Everson v. Board of Ed. of Ewing, 330 U.S. 1 (1947), and a word needs to be said about the different view taken in today's dissent. We all agree, of course, on the need for some interpretative help. The First Amendment contains no textual definition of "establishment," and the term is certainly not self-defining. No one contends that the prohibition of establishment stops at a designation of a national (or with Fourteenth Amendment incorporation, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), a state) church, but nothing in the text says just how much more it covers. There is no simple answer, for more than one reason.

The prohibition on establishment covers a variety of issues from prayer in widely varying government settings, to financial aid for religious individuals and institutions, to comment on religious questions. In these varied settings, issues of about interpreting inexact Establishment Clause language, like difficult interpretative issues generally, arise from the

tension of competing values, each constitutionally respectable, but none open to realization to the logical limit.

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Given the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause. The principle has been helpful simply because it responds to one of the major concerns that prompted adoption of the Religion Clauses. The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, Wallace v. Jaffree, 472 U.S., at 52—54, and n. 38, but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate; nothing does a better job of roiling society, a point that needed no explanation to the descendants of English Puritans and Cavaliers (or Massachusetts Puritans and Baptists). E.g., Everson, supra, at 8 ("A large proportion of the early settlers of this country came here from Europe to escape [religious persecution]"). A sense of the past thus points to governmental neutrality as an objective of the Establishment Clause, and a sensible standard for applying it. To be sure, given its generality as a principle, an appeal to neutrality alone cannot possibly lay every issue to rest, or tell us what issues on the margins are substantial enough for constitutional significance, a point that has been clear from the Founding era to modern times. E.g., Letter from J. Madison to R. Adams (1832), in 5 The Founders' Constitution at 107 (P. Kurland & R. Lerner eds. 1987) ("[In calling for separation] I must admit moreover that it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points"); Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting) ("The constitutional obligation of 'neutrality' ... is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation"). But invoking neutrality is a prudent way of keeping sight of something the Framers of the First Amendment thought important.

The dissent, however, puts forward a limitation on the application of the neutrality principle, with citations to historical evidence said to show that the Framers understood the ban on establishment of religion as sufficiently narrow to allow the government to espouse submission to the divine will. The dissent identifies God as the God of monotheism, all of whose three principal strains (Jewish, Christian, and Muslim) acknowledge the religious importance of the Ten Commandments. Post, at 9—10. On the dissent's view, it apparently follows that even rigorous espousal of a common element of this common monotheism, is consistent with the establishment ban.

But the dissent's argument for the original understanding is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed. The dissent is certainly correct in putting forward evidence that some of the Framers thought some endorsement of religion was compatible with the establishment ban; the dissent quotes the first President as stating that "national morality [cannot] prevail in exclusion of religious principle," for example, post, at 3, and it cites his first Thanksgiving proclamation giving thanks to God, post, at 2 (internal quotation marks omitted). Surely if expressions like these from Washington and his contemporaries were all we had to go on, there would be a good case that the neutrality principle has the effect of broadening the ban on establishment beyond the Framers' understanding of it (although there would, of course, still be the question of whether the historical case could overcome some 60 years of precedent taking neutrality as its guiding principle).24

But the fact is that we do have more to go on, for there is also evidence supporting the proposition that the Framers intended the Establishment Clause to require governmental neutrality in matters of religion, including neutrality in statements acknowledging religion. The very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and, the final language instead "extended [the]

prohibition to state support for 'religion' in general." See Lee v. Weisman, 505 U.S. 577, 614—615 (1992) (Souter, J., concurring) (tracing development of language).

The historical record, moreover, is complicated beyond the dissent's account by the writings and practices of figures no less influential than Thomas Jefferson and James Madison. Jefferson, for example, refused to issue Thanksgiving Proclamations because he believed that they violated the Constitution. See Letter to S. Miller (Jan. 23, 1808), in 5 The Founders' Constitution at 98. And Madison, whom the dissent claims as supporting its thesis, post, at 4, criticized Virginia's general assessment tax not just because it required people to donate "three pence" to religion, but because "it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." 505 U.S., at 622 (internal quotation marks omitted); see also Letter from J. Madison to E. Livingston (July 10, 1822), in 5 The Founders' Constitution, at 106 ("[R]eligion & Govt. will both exist in greater purity, the less they are mixed together"); Letter from J. Madison to J. Adams (Sept. 1833) in Religion and Politics in the Early Republic 120 (D. Dresibach ed. 1996) (stating that with respect to religion and government the "tendency to a usurpation on one side, or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of the Government from interference"); Van Orden v. Perry, 545 U.S. ___ (2005) (Stevens, J., dissenting) (slip op., at 19-20).25

The fair inference is that there was no common understanding about the limits of the establishment prohibition, and the dissent's conclusion that its narrower view was the original understanding, post, at 2—3, stretches the evidence beyond tensile capacity. What the evidence does show is a group of statesmen, like others before and after them, who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined. And none the worse for that. Indeterminate edges are the kind to have in a constitution meant to endure, and to meet "exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." McCulloch v. Maryland, 4 Wheat. 316, 415 (1819).

While the dissent fails to show a consistent original understanding from which to argue that the neutrality principle should be rejected, it does manage to deliver a surprise. As mentioned, the dissent says that the deity the Framers had in mind was the God of monotheism, with the consequence that government may espouse a tenet of traditional monotheism. This is truly a remarkable view. Other members of the Court have dissented on the ground that the Establishment Clause bars nothing more than governmental preference for one religion over another, e.g., Wallace v. Jaffree, 472 U.S., at 98—99 (Rehnquist, J., dissenting), but at least religion has previously been treated inclusively. Today's dissent, however, apparently means that government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should trouble anyone who prizes religious liberty. Certainly history cannot justify it; on the contrary, history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no member of this Court takes as a premise for construing the Religion Clauses. Justice Story probably reflected the thinking of the framing generation when he wrote in his Commentaries that the purpose of the Clause was "not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects." R. Cord, Separation of Church and State: Historical Fact and Current Fiction 13 (1988) (emphasis omitted). The Framers would, therefore, almost certainly object to the dissent's unstated reasoning that because Christianity was a monotheistic "religion," monotheism with Mosaic antecedents should be a touchstone of establishment interpretation.26 Even on originalist critiques of existing precedent there is, it seems, no escape from interpretative consequences that would surprise the Framers. Thus, it appears to be common ground in the interpretation of a Constitution "intended to endure for ages to come," McCulloch v. Maryland, supra, at 415, that applications unanticipated by the Framers are inevitable.

Historical evidence thus supports no solid argument for changing course (whatever force the argument might have when directed at the existing precedent), whereas public discourse at the present time certainly raises no doubt about the value of the interpretative approach invoked for 60 years now. We are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual.

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Notes to the excerpt from the opinion of the Court

24. The dissent also maintains that our precedents show that a solo display of the Commandments is a mere acknowledgement of religion "on par with the inclusion of a crčche or a menorah" in a holiday display, or an official's speech or prayer, post, at 22. Whether or not our views would differ about the significance of those practices if we were considering them as original matters, they manifest no objective of subjecting individual lives to religious influence comparable to the apparent and openly acknowledged purpose behind posting the Commandments. Crčches placed with holiday symbols and prayers by legislators do not insistently call for religious action on the part of citizens; the history of posting the Commandments expressed a purpose to urge citizens to act in prescribed ways as a personal response to divine authority.

25. The dissent cites material suggesting that separationists like Jefferson and Madison were not absolutely consistent in abstaining from official religious acknowledgment. Post, at 4. But, a record of inconsistent historical practice is too weak a lever to upset decades of precedent adhering to the neutrality principle. And it is worth noting that Jefferson thought his actions were consistent with non-endorsement of religion and Madison regretted any backsliding he may have done. Lee v. Weisman, 505 U.S. 577, 622–25 (1992) (Souter, J., concurring). "Homer nodded." Id., at 624, n. 5 (corrected in erratum at 535 U.S., at II).

26. There might, indeed, even have been some reservations about monotheism as the paradigm example. It is worth noting that the canonical biography of George Washington, the dissent's primary exemplar of the monotheistic tradition, calls him a deist. J. Flexner, George Washington: Anguish and Farewell (1793–1799) 490 (1972) ("Washington's religious belief was that of the enlightenment: deism"). It would have been odd for the First Congress to propose an Amendment with Religion Clauses that took no account of the President's religion. As with other historical matters pertinent here, however, there are conflicting conclusions. R. Brookhiser, Founding Father: Rediscovering George Washington 146 (1996) ("Washington's God was no watchmaker"). History writ small does not give clear and certain answers to questions about the limits of "religion" or "establishment."

Justice O'Connor, concurring.

[T]he goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

Our guiding principle has been James Madison's–that "[t]he Religion ... of every man must be left to the conviction and conscience of every man." Memorial and Remonstrance Against Religious Assessments, 2 Writings of James Madison 183, 184 (G. Hunt ed. 1901) (hereinafter Memorial). To that end, we have held that the guarantees of religious freedom protect citizens from religious incursions by the States as well as by the Federal Government. Everson v. Board of Ed. of Ewing, 330 U.S. 1, 16 (1947); Cantwell v. Connecticut, 310 U.S. 296

(1940). Government may not coerce a person into worshiping against her will, nor prohibit her from worshiping according to it. It may not prefer one religion over another or promote religion over nonbelief. Everson, supra, at 15—16. It may not entangle itself with religion. Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 674 (1970). And government may not, by "endorsing religion or a religious practice," "mak[e] adherence to religion relevant to a person's standing in the political community." Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in judgment).

When we enforce these restrictions, we do so for the same reason that guided the Framers–respect for religion's special role in society. Our Founders conceived of a Republic receptive to voluntary religious expression, and provided for the possibility of judicial intervention when government action threatens or impedes such expression. Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices. When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship. In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risks to both.

* * * *

We owe our First Amendment to a generation with a profound commitment to religion and a profound commitment to religious liberty–visionaries who held their faith "with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar." Zorach, supra, at 324—325 (Jackson, J., dissenting). . . .

The dissenting opinion of Justice Scalia

[Excluding religion] from the public forum . . . is not, and never was, the model adopted by America. George Washington added to the form of Presidential oath prescribed by Art. II, §1, cl. 8, of the Constitution, the concluding words "so help me God." See Blomquist, The Presidential Oath, the American National Interest and a Call for Presiprudence, 73 UMKC L. Rev. 1, 34 (2004). The Supreme Court under John Marshall opened its sessions with the prayer, "God save the United States and this Honorable Court." 1 C. Warren, The Supreme Court in United States History 469 (rev. ed. 1926). The First Congress instituted the practice of beginning its legislative sessions with a prayer. Marsh v. Chambers, 463 U.S. 783, 787 (1983). The same week that Congress submitted the Establishment Clause as part of the Bill of Rights for ratification by the States, it enacted legislation providing for paid chaplains in the House and Senate. Id., at 788. The day after the First Amendment was proposed, the same Congress that had proposed it requested the President to proclaim " a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favours of Almighty God." See H. R. Jour., 1st Cong., 1st Sess. 123 (1826 ed.); see also Sen. Jour., 1st Sess., 88 (1820 ed.). President Washington offered the first Thanksgiving Proclamation shortly thereafter, devoting November 26, 1789 on behalf of the American people " 'to the service of that great and glorious Being who is the beneficent author of all the good that is, that was, or that will be,' " Van Orden v. Perry, ante, at 7—8 (plurality opinion) (quoting President Washington's first Thanksgiving Proclamation), thus beginning a tradition of offering gratitude to God that continues today. See Wallace v. Jaffree, 472 U.S. 38, 100—103 (1985) (Rehnquist, J., dissenting).1 The same Congress also reenacted the Northwest Territory Ordinance of 1787, 1 Stat. 50, Article III of which provided: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Id., at 52, n. (a). And

of course the First Amendment itself accords religion (and no other manner of belief) special constitutional protection.

These actions of our First President and Congress and the Marshall Court were not idiosyncratic; they reflected the beliefs of the period. Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality. The "fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." School Dist. of Abington Township v. Schempp, 374 U.S. 203, 213 (1963).... President Washington opened his Presidency with a prayer, see Inaugural Addresses of the Presidents of the United States 1, 2 (1989), and reminded his fellow citizens at the conclusion of it that "reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." Farewell Address (1796), reprinted in 35 Writings of George Washington 229 (J. Fitzpatrick ed. 1940). President John Adams wrote to the Massachusetts Militia, "we have no government armed with power capable of contending with human passions unbridled by morality and religion. ... Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." Letter (Oct. 11, 1798), reprinted in 9 Works of John Adams 229 (C. Adams ed. 1971). Thomas Jefferson concluded his second inaugural address by inviting his audience to pray:

> "I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations." Inaugural Addresses of the Presidents of the United States, at 18, 22—23.

James Madison, in his first inaugural address, likewise placed his confidence "in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future." ...

Nor have the views of our people on this matter significantly changed. Presidents continue to conclude the Presidential oath with the words "so help me God." Our legislatures, state and national, continue to open their sessions with prayer led by official chaplains. The sessions of this Court continue to open with the prayer "God save the United States and this Honorable Court." Invocation of the Almighty by our public figures, at all levels of government, remains commonplace. Our coinage bears the motto "IN GOD WE TRUST." And our Pledge of Allegiance contains the acknowledgment that we are a Nation "under God." As one of our Supreme Court opinions rightly observed, "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952), repeated with approval in Lynch v. Donnelly, 465 U.S. 668, 675 (1984); Marsh, 463 U.S., at 792; Abington Township, supra, at 213.

With all of this reality (and much more) staring it in the face, how can the Court possibly assert that " 'the First Amendment mandates governmental neutrality between ... religion and nonreligion,' " ... and that "[m]anifesting a purpose to favor ... adherence to religion generally," ... is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. Surely not even the current sense of our society....2 And it is, moreover, a thoroughly discredited say-so...

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[W]ith respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists

and believers in unconcerned deities, just as it permits the disregard of devout atheists. The Thanksgiving Proclamation issued by George Washington at the instance of the First Congress was scrupulously nondenominational–but it was monotheistic.3 In Marsh v. Chambers, supra, we said that the fact the particular prayers offered in the Nebraska Legislature were "in the Judeo-Christian tradition," . . . posed no additional problem, because "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief,". . . .

Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. The former is, as Marsh v. Chambers put it, "a tolerable acknowledgment of beliefs widely held among the people of this country." . . . The three most popular religions in the United States, Christianity, Judaism, and Islam–which combined account for 97.7% of all believers–are monotheistic. See U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2004—2005, p. 55 (124th ed. 2004) (Table No. 67). All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life. See 13 Encyclopedia of Religion 9074 (2d ed. 2005); The Qur'an 104 (M. Haleem trans. 2004). Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population–from Christians to Muslims–that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.4

A few remarks are necessary in response to the criticism of this dissent by the Court, as well as Justice Stevens' criticism in the related case of Van Orden v. Perry. . . . Justice Stevens' writing is largely devoted to an attack upon a straw man. "[R]eliance on early religious proclamations and statements made by the Founders is ... problematic," he says, "because those views were not espoused at the Constitutional Convention in 1787 nor enshrined in the Constitution's text." . . . . But I have not relied upon (as he and the Court in this case do) mere "proclamations and statements" of the Founders. I have relied primarily upon official acts and official proclamations of the United States or of the component branches of its Government, including the First Congress's beginning of the tradition of legislative prayer to God, its appointment of congressional chaplains, its legislative proposal of a Thanksgiving Proclamation, and its reenactment of the Northwest Territory Ordinance; our first President's issuance of a Thanksgiving Proclamation; and invocation of God at the opening of sessions of the Supreme Court. The only mere "proclamations and statements" of the Founders I have relied upon were statements of Founders who occupied federal office, and spoke in at least a quasi-official capacity–Washington's prayer at the opening of his Presidency and his Farewell Address, President John Adams' letter to the Massachusetts Militia, and Jefferson's and Madison's inaugural addresses. The Court and Justice Stevens, by contrast, appeal to no official or even quasi-official action in support of their view of the Establishment Clause–only James Madison's Memorial and Remonstrance Against Religious Assessments, written before the federal Constitution had even been proposed, two letters written by Madison long after he was President, and the quasi-official inaction of Thomas Jefferson in refusing to issue a Thanksgiving Proclamation. . . . The Madison Memorial and Remonstrance, dealing as it does with enforced contribution to religion rather than public acknowledgment of God, is irrelevant; one of the letters is utterly ambiguous as to the point at issue here, and should not be read to contradict Madison's statements in his first inaugural address, quoted earlier; even the other letter does not disapprove public acknowledgment of God, unless one posits (what Madison's own actions as President would contradict) that reference to God contradicts "the equality of all religious sects." See Letter from James Madison to Edward Livingston (July 10, 1822), in 5 The Founders' Constitution 105—106 (P. Kurland & R. Lerner eds. 1987). And as to Jefferson: the notoriously self-contradicting Jefferson did not choose to have his nonauthorship of a Thanksgiving Proclamation inscribed on his tombstone. What he did have inscribed was his authorship of the

Virginia Statute for Religious Freedom, a governmental act which begins "Whereas Almighty God hath created the mind free . . . ." Va. Code Ann. §57–1 (Lexis 2003).

It is no answer for Justice Stevens to say that the understanding that these official and quasi-official actions reflect was not "enshrined in the Constitution's text." . . . The Establishment Clause, upon which Justice Stevens would rely, was enshrined in the Constitution's text, and these official actions show what it meant. There were doubtless some who thought it should have a broader meaning, but those views were plainly rejected. Justice Stevens says that reliance on these actions is "bound to paint a misleading picture," . . . but it is hard to see why. What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?

Justice Stevens also appeals to the undoubted fact that some in the founding generation thought that the Religion Clauses of the First Amendment should have a narrower meaning, protecting only the Christian religion or perhaps only Protestantism. . . . I am at a loss to see how this helps his case, except by providing a cloud of obfuscating smoke. (Since most thought the Clause permitted government invocation of monotheism, and some others thought it permitted government invocation of Christianity, he proposes that it be construed not to permit any government invocation of religion at all.) At any rate, those narrower views of the Establishment Clause were as clearly rejected as the more expansive ones. Washington's First Thanksgiving Proclamation is merely an example. All of the actions of Washington and the First Congress upon which I have relied, virtually all Thanksgiving Proclamations throughout our history,5 and all the other examples of our Government's favoring religion that I have cited, have invoked God, but not Jesus Christ.6 Rather than relying upon Justice Stevens' assurance that "[t]he original understanding of the type of 'religion' that qualified for constitutional protection under the First amendment certainly did not include . . . followers of Judaism and Islam," . . . I would prefer to take the word of George Washington, who, in his famous Letter to the Hebrew Congregation of Newport, Rhode Island, wrote that,

> "All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights." 6 The Papers of George Washington, Presidential Series 285 (D. Twohig et al. eds. 1996).

The letter concluded, by the way, with an invocation of the one God:

> "May the father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations useful here, and in his own due time and way everlastingly happy."

* * * *

Finally, I must respond to Justice Stevens' assertion that I would "marginaliz[e] the belief systems of more than 7 million Americans" who adhere to religions that are not monotheistic. . . . Surely that is a gross exaggeration. The beliefs of those citizens are entirely protected by the Free Exercise Clause, and by those aspects of the Establishment Clause that do not relate to government acknowledgment of the Creator. Invocation of God despite their beliefs is permitted not because nonmonotheistic religions cease to be religions recognized by the religion clauses of the First Amendment, but because governmental invocation of God is not an establishment. Justice Stevens fails to recognize that in the context of public acknowledgments of God there are legitimate competing interests: On the one hand, the interest of that minority in not feeling "excluded"; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication as a people, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority. . . . It is not for this Court to change a disposition that accounts, many Americans think, for the phenomenon remarked upon in a quotation attributed to various authors, including Bismarck, but which I prefer to associate with Charles de Gaulle: "God watches over little children, drunkards, and the United States of America."

Notes to the excerpt from Justice Scalia's dissenting opinion

1. See, e.g., President's Thanksgiving Day 2004 Proclamation (Nov. 23, 2004), available at http://www.whitehouse.gov/news/releases/2004/11/20041123-4. html (all internet materials as visited June 24, 2005 and available in Clerk of Court's case file).
2. The fountainhead of this jurisprudence, Everson v. Board of Ed. of Ewing, based its dictum that "[n]either a state nor the Federal Government . . . can pass laws which . . . aid all religions," 330 U.S., at 15, on a review of historical evidence that focused on the debate leading up to the passage of the Virginia Bill for Religious Liberty, see id., at 11—13. A prominent commentator of the time remarked (after a thorough review of the evidence himself) that it appeared the Court had been "sold . . . a bill of goods." Corwin, The Supreme Court as National School Board, 14 Law & Contemp. Prob. 3, 16 (1949).
3. The Court thinks it "surpris[ing]" and "truly remarkable" to believe that "the deity the Framers had in mind" (presumably in all the instances of invocation of the deity I have cited) "was the God of monotheism." Ante, at 32. This reaction would be more comprehensible if the Court could suggest what other God (in the singular, and with a capital G) there is, other than "the God of monotheism." This is not necessarily the Christian God (though if it were, one would expect Christ regularly to be invoked, which He is not); but it is inescapably the God of monotheism.
4. This is not to say that a display of the Ten Commandments could never constitute an impermissible endorsement of a particular religious view. The Establishment Clause would prohibit, for example, governmental endorsement of a particular version of the Decalogue as authoritative. Here the display of the Ten Commandments alongside eight secular documents, and the plaque's explanation for their inclusion, make clear that they were not posted to take sides in a theological dispute.
5. The two exceptions are the March 23, 1798 proclamation of John Adams, which asks God "freely to remit all our offenses" "through the Redeemer of the World," http://www.pilgrimhall.org/ThanxProc1789.htm, and the November 17, 1972 proclamation of Richard Nixon, which stated, "From Moses at the Red Sea to Jesus preparing to feed the multitudes, the Scriptures summon us to words and deeds of gratitude, even before divine blessings are fully perceived," Presidential Proclamation No. 4170, 37 Fed. Reg. 24647 (1972).
6. Justice Stevens finds that Presidential inaugural and farewell speeches (which are the only speeches upon which I have relied) do not violate the Establishment Clause only because everyone knows that they express the personal religious views of the speaker, and not government policy. See Van Orden, ante, at 17—18 (dissenting opinion). This is a peculiar stance for one who has voted that a student-led invocation at a high school football game and a rabbi-led invocation at a high school graduation did constitute the sort of governmental endorsement of religion that the Establishment Clause forbids. See Santa Fe Independent School Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992).

VAN ORDEN v. PERRY

545 U.S. — (2005)

[Among 21 historical markers and 17 monuments surrounding the Texas State Capitol is a 6-foot-high monolith inscribed with the Ten Commandments. After accepting the monument from the Fraternal Order of Eagles–a national social, civic, and patriotic organization–the State selected a site for it based on the recommendation of the state organization that maintains the capitol grounds.

[Held: The Establishment Clause allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds.]

The Opinion of the Court (Rehnquist, C.J.)

[W]hatever may be the fate of the Lemon test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history.

As we explained in Lynch v. Donnelly, 465 U.S. 668 (1984): "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." Id., at 674. For example, both Houses passed resolutions in 1789 asking President George Washington to issue a Thanksgiving Day Proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many and signal favors of Almighty God." 1 Annals of Cong. 90, 914. President Washington's proclamation directly attributed to the Supreme Being the foundations and successes of our young Nation . . . .

Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. . . .

The concurring opinion of Justice Thomas

This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges,* and return to the original meaning of the Clause. I have previously suggested that the Clause's text and history "resis[t] incorporation" against the States. See Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 46, (2004) (opinion concurring in judgment); see also Zelman v. Simmons-Harris, 536 U.S. 639, 677–680, and n. 3 (2002) (opinion concurring). If the Establishment Clause does not restrain the States, then it has no application here, where only state action is at issue.

Even if the Clause is incorporated, or if the Free Exercise Clause limits the power of States to establish religions, see Cutter v. Wilkinson, 544 U.S. ___, ___, n. 3 (2005) (slip op., at 3, n. 3) (Thomas, J., concurring), our task would be far simpler if we returned to the original meaning of the word "establishment" than it is under the various approaches this Court now uses. The Framers understood an establishment "necessarily [to] involve actual legal coercion." Newdow, supra, at 52 (Thomas, J., concurring in judgment); Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty"). "In other words, establishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers." Cutter, supra, at ___ (slip op., at 4) (Thomas, J., concurring). And "government practices that have nothing to do with creating or maintaining ... coercive state establishments" simply do not "implicate the possible liberty interest of being free from coercive state establishments." Newdow, supra, at 53 (Thomas, J., concurring in judgment).

There is no question that, based on the original meaning of the Establishment Clause, the Ten Commandments display at issue here is constitutional. In no sense does Texas compel petitioner Van Orden to do anything. The only injury to him is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library. He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life. The mere presence of the monument along his path involves no coercion and thus does not violate the Establishment Clause.

Returning to the original meaning would do more than simplify our task. It also would avoid the pitfalls present in the Court's current approach to such challenges. This Court's precedent elevates the trivial to the proverbial "federal case," by making benign signs and postings subject to challenge. Yet even as it does so, the Court's precedent attempts to avoid declaring all religious symbols and words of longstanding tradition unconstitutional, by counterfactually declaring them of little religious significance. Even when the Court's cases recognize that such symbols have religious meaning, they adopt an unhappy compromise that fails fully to account for either the adherent's or the nonadherent's beliefs, and provides no principled way to choose between them. Even worse, the incoherence of the Court's decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application. All told, this Court's jurisprudence leaves courts, governments, and believers and nonbelievers

alike confused–an observation that is hardly new. See Newdow, supra, at 45, n. 1 (Thomas, J., concurring in judgment) (collecting cases).
* * * *

The dissenting opinion of Justice Stevens

Government's obligation to avoid divisiveness and exclusion in the religious sphere is compelled by the Establishment and Free Exercise Clauses, which together erect a wall of separation between church and state.4 This metaphorical wall protects principles long recognized and often recited in this Court's cases. The first and most fundamental of these principles, one that a majority of this Court today affirms, is that the Establishment Clause demands religious neutrality–government may not exercise a preference for one religious faith over another. See, e.g., McCreary County v. American Civil Liberties Union, Ky., post, at 27—29.5 This essential command, however, is not merely a prohibition against the government's differentiation among religious sects. We have repeatedly reaffirmed that neither a State nor the Federal Government "can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (footnote omitted).6 This principle is based on the straightforward notion that governmental promotion of orthodoxy is not saved by the aggregation of several orthodoxies under the State's banner. See Abington, 374 U.S., at 222.

* * * *

[T]he plurality is correct to note that "religion and religious traditions" have played a "strong role ... throughout our nation's history." Ante, at 3. This Court has often recognized "an unbroken history of official acknowledgment ... of the role of religion in American life." Lynch v. Donnelly, 465 U.S. 668, 674 (1984); accord, Edwards v. Aguillard, 482 U.S. 578, 606—608 (1987) (Powell, J., concurring). Given this history, it is unsurprising that a religious symbol may at times become an important feature of a familiar landscape or a reminder of an important event in the history of a community. The wall that separates the church from the State does not prohibit the government from acknowledging the religious beliefs and practices of the American people, nor does it require governments to hide works of art or historic memorabilia from public view just because they also have religious significance.

* * * *

The plurality relies heavily on the fact that our Republic was founded, and has been governed since its nascence, by leaders who spoke then (and speak still) in plainly religious rhetoric. The Chief Justice cites, for instance, George Washington's 1789 Thanksgiving Proclamation in support of the proposition that the Establishment Clause does not proscribe official recognition of God's role in our Nation's heritage, ante, at 7—8.20 Further, the plurality emphatically endorses the seemingly timeless recognition that our "institutions presuppose a Supreme Being," ante, at 4. Many of the submissions made to this Court by the parties and amici, in accord with the plurality's opinion, have relied on the ubiquity of references to God throughout our history.

The speeches and rhetoric characteristic of the founding era, however, do not answer the question before us. . . . [O]ur leaders, when delivering public addresses, often express their blessings simultaneously in the service of God and their constituents. Thus, when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from the government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity.21 The permanent placement of a textual religious display on state property is different in kind; it amalgamates otherwise discordant individual views into a collective statement of government approval. Moreover, the message never ceases to transmit itself to objecting viewers whose only choices are to accept the message or to ignore the offense by averting their gaze. Cf. Allegheny County, 492 U.S., at 664

(Kennedy, J., concurring in judgment in part and dissenting in part); ante, at 4 (Thomas, J., concurring). In this sense, although Thanksgiving Day proclamations and inaugural speeches undoubtedly seem official, in most circumstances they will not constitute the sort of governmental endorsement of religion at which the separation of church and state is aimed.22

The plurality's reliance on early religious statements and proclamations made by the Founders is also problematic because those views were not espoused at the Constitutional Convention in 178723 nor enshrined in the Constitution's text. Thus, the presentation of these religious statements as a unified historical narrative is bound to paint a misleading picture. It does so here. In according deference to the statements of George Washington and John Adams, The Chief Justice and Justice Scalia, see ante, at 7 (plurality opinion); McCreary County, post, at 3—4 (dissenting opinion), fail to account for the acts and publicly espoused views of other influential leaders of that time. Notably absent from their historical snapshot is the fact that Thomas Jefferson refused to issue the Thanksgiving proclamations that Washington had so readily embraced based on the argument that to do so would violate the Establishment Clause.24 The Chief Justice and Justice Scalia disregard the substantial debates that took place regarding the constitutionality of the early proclamations and acts they cite, see, e.g., Letter from James Madison to Edward Livingston (July 10, 1822), in 5 The Founders' Constitution 105—106 (P. Kurland & R. Lerner eds. 1987) (hereinafter Founders' Constitution) (arguing that Congress' appointment of Chaplains to be paid from the National Treasury was "not with my approbation" and was a "deviation" from the principle of "immunity of Religion from civil jurisdiction"),25 and paper over the fact that Madison more than once repudiated the views attributed to him by many, stating unequivocally that with respect to government's involvement with religion, the " 'tendency to a usurpation on one side, or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of the Government from interference, in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others.' "26

These seemingly nonconforming sentiments should come as no surprise. Not insignificant numbers of colonists came to this country with memories of religious persecution by monarchs on the other side of the Atlantic. See A. Stokes & L. Pfeffer, Church and State in the United States 3—23 (rev. ed. 1964). Others experienced religious intolerance at the hands of colonial Puritans, who regrettably failed to practice the tolerance that some of their contemporaries preached. Engel v. Vitale, 370 U.S. 421, 427—429 (1962). The Chief Justice and Justice Scalia ignore the separationist impulses–in accord with the principle of "neutrality"–that these individuals brought to the debates surrounding the adoption of the Establishment Clause.27

Ardent separationists aside, there is another critical nuance lost in the plurality's portrayal of history. Simply put, many of the Founders who are often cited as authoritative expositors of the Constitution's original meaning understood the Establishment Clause to stand for a narrower proposition than the plurality, for whatever reason, is willing to accept. Namely, many of the Framers understood the word "religion" in the Establishment Clause to encompass only the various sects of Christianity.

The evidence is compelling. Prior to the Philadelphia Convention, the States had begun to protect "religious freedom" in their various constitutions. Many of those provisions, however, restricted "equal protection" and "free exercise" to Christians, and invocations of the divine were commonly understood to refer to Christ.28 That historical background likely informed the Framers' understanding of the First Amendment. Accordingly, one influential thinker wrote of the First Amendment that " '[t]he meaning of the term "establishment" in this amendment unquestionably is, the preference and establishment given by law to one sect of Christians over every other.' " Jasper Adams, The Relation of Christianity to Civil Government in the United States (Feb. 13, 1833) (quoted in Dreisbach 16). That definition tracked the understanding of the text Justice Story adopted in his famous Commentaries, in which he wrote that the "real object" of the Clause was:

> "not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government. It thus sought to cut off the means of religious persecution, (the vice and pest of former ages,) and the power of subverting the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age." 2 J. Story, Commentaries on the Constitution of the United States §991, p. 701 (R. Rotunda & J. Nowak eds. 1987) (hereinafter Story); see also Wallace, 472 U.S., at 52—55, and n. 36.29

Along these lines, for nearly a century after the Founding, many accepted the idea that America was not just a religious nation, but "a Christian nation." Church of Holy Trinity v. United States, 143 U.S. 457, 471 (1892).30

The original understanding of the type of "religion" that qualified for constitutional protection under the Establishment Clause likely did not include those followers of Judaism and Islam who are among the preferred "monotheistic" religions Justice Scalia has embraced in his McCreary County opinion. See post, at 10—11 (dissenting opinion).31 The inclusion of Jews and Muslims inside the category of constitutionally favored religions surely would have shocked Chief Justice Marshall and Justice Story. Indeed, Justice Scalia is unable to point to any persuasive historical evidence or entrenched traditions in support of his decision to give specially preferred constitutional status to all monotheistic religions. Perhaps this is because the history of the Establishment Clause's original meaning just as strongly supports a preference for Christianity as it does a preference for monotheism. Generic references to "God" hardly constitute evidence that those who spoke the word meant to be inclusive of all monotheistic believers; nor do such references demonstrate that those who heard the word spoken understood it broadly to include all monotheistic faiths. See supra, at 21. Justice Scalia's inclusion of Judaism and Islam is a laudable act of religious tolerance, but it is one that is unmoored from the Constitution's history and text, and moreover one that is patently arbitrary in its inclusion of some, but exclusion of other (e.g., Buddhism), widely practiced non-Christian religions. See supra, at 12, 13—14, and n. 16 (noting that followers of Buddhism nearly equal the number of Americans who follow Islam). Given the original understanding of the men who championed our "Christian nation"–men who had no cause to view anti-Semitism or contempt for atheists as problems worthy of civic concern–one must ask whether Justice Scalia "has not had the courage (or the foolhardiness) to apply [his originalism] principle consistently." McCreary County, post, at 7.

Indeed, to constrict narrowly the reach of the Establishment Clause to the views of the Founders would lead to more than this unpalatable result; it would also leave us with an unincorporated constitutional provision–in other words, one that limits only the federal establishment of "a national religion." See Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring in judgment); cf. A. Amar, The Bill of Rights 36—39 (1998). Under this view, not only could a State constitutionally adorn all of its public spaces with crucifixes or passages from the New Testament, it would also have full authority to prescribe the teachings of Martin Luther or Joseph Smith as the official state religion. Only the Federal Government would be prohibited from taking sides, (and only then as between Christian sects).

A reading of the First Amendment dependent on either of the purported original meanings expressed above would eviscerate the heart of the Establishment Clause. It would replace Jefferson's "wall of separation" with a perverse wall of exclusion–Christians inside, non-Christians out. It would permit States to construct walls of their own choosing–Baptists inside, Mormons out; Jewish Orthodox inside, Jewish Reform out. A Clause so understood might be faithful to the expectations of some of our Founders, but it is plainly not worthy of a society whose enviable hallmark over the course of two centuries has been the continuing expansion of religious pluralism and tolerance. Cf. Abington, 374 U.S., at 214; Zelman v. Simmons-Harris, 536 U.S. 639, 720, 723 (2002) (Breyer, J., dissenting).

Unless one is willing to renounce over 65 years of Establishment Clause jurisprudence and cross back over the incorporation bridge, see Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), appeals to the religiosity of the Framers ring hollow.32 But even if there were a coherent way to embrace incorporation with one hand while steadfastly abiding by the Founders' purported religious views on the other, the problem of the selective use of history remains. As the widely divergent views espoused by the leaders of our founding era plainly reveal, the historical record of the preincorporation Establishment Clause is too indeterminate to serve as an interpretive North Star.33

It is our duty, therefore, to interpret the First Amendment's command that "Congress shall make no law respecting an establishment of religion" not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the Clause's text and history the broad principles that remain valid today. . . .

* * * *

Notes to excerpts from Justice Stevens' dissenting opinion

4. The accuracy and utility of this metaphor have been called into question. See, e.g., Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting); see generally P. Hamburger, Separation of Church and State (2002). Whatever one may think of the merits of the historical debate surrounding Jefferson and the "wall" metaphor, this Court at a minimum has never questioned the concept of the "separation of church and state" in our First Amendment jurisprudence. The Chief Justice's opinion affirms that principle. Ante, at 4 (demanding a "separation between church and state"). Indeed, even the Court that famously opined that "[w]e are a religious people whose institutions presuppose a Supreme Being," Zorach v. Clauson, 343 U.S. 306, 313 (1952), acknowledged that "[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated," id., at 312. The question we face is how to give meaning to that concept of separation.

5. There is now widespread consensus on this principle. See Everson v. Board of Ed. of Ewing, 330 U.S. 1, 15 (1947) ("Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another"); School District of Abington Township v. Schempp, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality"); Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another"); see also Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 748 (1994) (Scalia, J., dissenting) ("I have always believed ... that the Establishment Clause prohibits the favoring of one religion over others"); but see Church of Holy Trinity v. United States, 143 U.S. 457, 470—471 (1892).

6. In support of this proposition, the Torcaso Court quoted James Iredell, who in the course of debating the adoption of the Federal Constitution in North Carolina, stated: " 'it is objected that the people of America may perhaps choose representatives who have no religion at all, and that Pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?' " 367 U.S., at 495, n. 10 (quoting 4 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 197 (1836 ed.)).

23. See, e.g., J. Hutson, Religion and the Founding of the American Republic 75 (1998) (noting the dearth of references to God at the Philadelphia Convention and that many contemporaneous observers of the Convention complained that "the Framers had unaccountably turned their backs on the Almighty" because they " 'found the Constitution without any acknowledgement of God' ").

24. See Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808), in 5 Founders' Constitution 98; 11 Jefferson's Writings 428—430 (1905); see also Lee, 505 U.S., at 623—625 (Souter, J., concurring) (documenting history); Lynch, 465 U.S., at 716, n. 23 (Brennan, J., dissenting) (same).

25. See also James Madison, Detached Memoranda, in 5 Founders' Constitution 103—104. Madison's letter to Livingston further argued that: "There has been another deviation from the strict principle in the Executive Proclamations of fasts & festivals, so far, at least, as they have spoken the language of injunction, or have lost sight of the equality of all religious sects in the eve of the Constitution.... Notwithstanding the general progress made within the last two centuries in favour of this branch of liberty, & the full establishment of it, in some parts of our Country, there remains in others a strong bias towards old error, that without some sort of alliance or coalition between [Government] & Religion neither can be duly supported. Such indeed is the tendency to such a coalition, and such its corrupting influence on both the

parties, that the danger cannot be too carefully guarded [against]. . . . Every new & successful example therefore of a perfect separation between ecclesiastical and civil matters, is of importance. And I have no doubt that every new example, will succeed, as every past one has done, in shewing that religion & [Government] will both exist in greater purity, the less they are mixed together." Id., at 105—106.

26. Religion and Politics in the Early Republic 20—21 (D. Dreisbach ed. 1996) (hereinafter Dreisbach) (quoting Letter from James Madison to Jasper Adams (1833)). See also Letter from James Madison to Edward Livingston (July 10, 1822), in 5 Founders' Constitution 106 ("We are teaching the world the great truth that [Governments] do better without Kings & Nobles than with them. The merit will be doubled by the other lesson that Religion flourishes in greater purity, without than with the aid of [Government]").

27. The contrary evidence cited by The Chief Justice and Justice Scalia only underscores the obvious fact that leaders who have drafted and voted for a text are eminently capable of violating their own rules. The first Congress was–just as the present Congress is–capable of passing unconstitutional legislation. Thus, it is no answer to say that the Founders' separationist impulses were "plainly rejected" simply because the first Congress enacted laws that acknowledged God. See McCreary County, post, at 13 (Scalia, J., dissenting). To adopt such an interpretive approach would misguidedly give authoritative weight to the fact that the Congress that passed the Fourteenth Amendment also enacted laws that tolerated segregation, and the fact that the Congress that passed the First Amendment also enacted laws, such as the Alien and Sedition Act, that indisputably violated our present understanding of the First Amendment. See n. 36, infra; Lee, 505 U.S., at 626 (Souter, J., concurring).

28. See, e.g., Strang, The Meaning of "Religion" in the First Amendment, 40 Duquesne L. Rev. 181, 220—223 (2002).

29. Justice Story wrote elsewhere that " 'Christianity is indispensable to the true interests & solid foundations of all free governments. I distinguish ... between the establishment of a particular sect, as the Religion of the State, & the Establishment of Christianity itself, without any preference of any particular form of it. I know not, indeed, how any deep sense of moral obligation or accountableness can be expected to prevail in the community without a firm persuasion of the great Christian Truths." Letter to Jasper Adams (May 14, 1833) Dreisbach 19.

30. See 143 U.S., at 471 (" '[W]e are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of ... imposters' " (quoting People v. Ruggles, 8 Johns. 290, 295 (N. Y. Sup. Ct. 1811))); see also Vidal v. Philadelphia, 2 How. 127, 198—199 (1844). These views should not be read as those of religious zealots. Chief Justice Marshall himself penned the historical genesis of the Court's assertion that our " 'institutions presuppose a Supreme Being,' " see Zorach, 343 U.S., at 313, writing that the "American population is entirely Christian, & with us, Christianity & Religion are identified. It would be strange, indeed, if with such a people, our institutions did not presuppose Christianity, & did not often refer to it, & exhibit relations with it." Letter from John Marshall to Jasper Adams (May 9, 1833) (quoted in Dreisbach 18—19). Accord, Story §988, p. 700 ("[A]t the time of the adoption of the constitution, . . . the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state ..." (footnote omitted)).

31. Justice Scalia's characterization of this conclusion as nothing more than my own personal "assurance" is misleading to say the least. McCreary County, post, at 13. Reliance on our Nation's early constitutional scholars is common in this Court's opinions. In particular, the author of the plurality once noted that "Joseph Story, a Member of this Court from 1811 to 1845, and during much of that time a professor at the Harvard Law School, published by far the most comprehensive treatise on the United States Constitution that had then appeared." Wallace, 472 U.S., at 104 (Rehnquist, J., dissenting). And numerous opinions of this Court, including two notable opinions authored by Justice Scalia, have seen it fit to give authoritative weight to Joseph Story's treatise when interpreting other constitutional provisions. See, e.g., United States v. Gaudin, 515 U.S. 506, 510—511 (1995) (Fifth Amendment); Harmelin v. Michigan, 501 U.S. 957, 981—982 (1991) (Eighth Amendment).

35. Justice Thomas contends that the Establishment Clause cannot include such a neutrality principle because the Clause reaches only the governmental coercion of individual belief or disbelief. Ante, at 4 (concurring opinion). In my view, although actual religious coercion is undoubtedly forbidden by the Establishment Clause, that cannot be the full extent of the provision's reach. Jefferson's "wall" metaphor and his refusal to issue Thanksgiving proclamations, see supra, at 19, would have been nonsensical if the Clause reached only direct coercion. Further, under the "coercion" view, the Establishment Clause would amount to little more than a replica of our compelled speech doctrine, see, e.g., West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 639 (1943), with a religious flavor. A Clause so interpreted would not prohibit explicit state endorsements of religious orthodoxies of particular sects, actions that lie at the heart of what the

Clause was meant to regulate. The government could, for example, take out television advertisements lauding Catholicism as the only pure religion. Under the reasoning endorsed by Justice Thomas, those programs would not be coercive because the viewer could simply turn off the television or ignore the ad. See ante, at 3 ("[T]he mere presence of the monument ... involves no coercion" because the passerby "need not stop to read it or even to look at it"). Further, the notion that the application of a "coercion" principle would somehow lead to a more consistent jurisprudence is dubious. Enshrining coercion as the Establishment Clause touchstone fails to eliminate the difficult judgment calls regarding "the form that coercion must take." McCreary County, post, at 25 (Scalia, J., dissenting). Coercion may seem obvious to some, while appearing nonexistent to others. Compare Santa Fe Independent School Dist., 530 U.S., at 312, with Lee, 505 U.S., at 642 (Scalia, J., dissenting). It may be a legal requirement or an effect that is indirectly inferred from a variety of factors. See, e.g., Engel v. Vitale, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain"). In short, "reasonable people could, and no doubt would, argue about whether coercion existed in a particular situation." Feldman, The Intellectual Origins of the Establishment Clause, 77 N. Y. U. L. Rev. 346, 415 (2002).